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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 178

ILLINOIS COMMERCE COMMISSION, JOHN D. BIGGS, WILLIAM PARRILLO, ET AL.,

Appellants,

vs.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Appellee.

APPELLEE'S REPLY TO BRIEF OF INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE.

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March 4, 1943.

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Appellee respectfully requests leave to present this reply to the Interstate Commerce Commission's brief *amicus curiae.*

The brief states (page 5) that "insofar as standard intrastate fares are concerned, the 1942 increase may well be mandatory as to fares covered by prior outstanding section 13 orders." A footnote to the sentence just quoted refers to the Montana fares, the Commission's action in which leaves no room for any other view. (See pp. 35 and 36 of our main brief and the Montana order appearing as an appendix thereto at pages 42-44, inclusive.) Clearly correct in that view, the Commission also correctly disposes of the erroneous contention of *amicus curiae*, City of New York, that the Commission's 1936 order had abrogated its prior section 13 orders (footnote 6, page 4, Commission's brief). And the Commission, like the Appellee, points out the entire consistency of the recital in the 1942 order with the Commission's action in ordering changes in intrastate fares which were being maintained or held by virtue of its outstanding orders.

The Commission fell into error only at the last minute. It says that, whereas its action on standard fares raised the section 13 intrastate fares to a point still below the ceiling previously found reasonable (3.6c per mile), that was not so as to these commutation fares, because a new ceiling would be necessary if the order applied to these Illinois intrastate commutation fares. In this the Commission overlooks its own action in having just found reasonable in that particular proceeding (*Ex Parte 148*, R. 32-34; *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, 564-566) and by the same order, the new ceiling established for Illinois-Wisconsin interstate commutation fares.[1] Here is the new ceiling of reasonableness at which the Illinois intrastate commuta-

[1] Interstate commutation fares were clearly included in the broad language "all fares," in the petition which was granted. There is no contention to the contrary.

tion fares of which the Commission had taken jurisdiction could and should be related to the interstate commutation fares. There was, therefore, a clear basis for maintaining by a single order the non-discriminatory relationship already established.

A separate and specific finding of reasonableness as to the intrastate rates was neither requisite nor appropriate. *United States* v. *Louisiana*, 290 U. S. 70, 75-80. In that case a section 13 order of the Commission was assailed as defective "because, in conforming the intrastate rates to the reasonable level of interstate rates, the Commission did not find specifically that in each case the rate as increased would be just and reasonable." This Court disposed of that contention by construing section 13 as follows (p. 78):

> "But we think that the relationship of the section to section 15a(2) already described is such that the standard of reasonableness prescribed by the latter is that necessarily set up for section 13(4) which supplements it. The considerations already detailed, which define that standard for section 15a necessarily define it for section 13(3) and (4), which creates a duty in 'dovetail' relationship to that imposed on the Commission by section 15a."

The petition of the railroads to the Interstate Commerce Commission for the increase (reproduced as Appendix E to the brief of *amicus curiae*, City of New York, pp. 55-61, inclusive), was couched in the broadest possible terms and covered all fares of which the Commission had jurisdiction. Nowhere was it limited to interstate fares. It said "all fares", with specific exceptions not material here. Naturally the petition did not apply to fares "made or imposed by the authority of any state" (the language of section 13 of the Interstate Commerce Act), but these

particular Illinois intrastate fares were not so made or imposed. They were made or imposed by an outstanding order of the Interstate Commerce Commission, and were being maintained by tariffs filed with the Interstate Commerce Commission. The prayer of the petition was "that the Commission enter a general order modifying all its outstanding orders to the extent necessary to enable petitioners to make effective the increases herein proposed." The Commission's order as to passenger fares was as broad on its face as the petition, and both were as broad as the power and jurisdiction of the Commission. A substantial body of rates still required state action, but not those of which this Commission had taken and was exercising a continuing jurisdiction.

Some confusion of thought has been brought into this case by failing to distinguish the term "intrastate fares" from the expression used in section 13 of the Interstate Commerce Act, "fare(s) * * * made or imposed by the authority of any state." The two things are not the same. When, as here in 1925, the intrastate fare is prescribed by the Commission, acting under the powers given in section 13, it ceases to be a fare "made or imposed by the authority of any state" and becomes one made or imposed by the authortiy of the Interstate Commerce Commission. The necessary jurisdictional findings once having been made (as here in 1925) and being of a continuing nature, the Commission can raise or lower the level in a general revenue case if, as here, that level is found reasonable, and at the same time preserve the nondiscriminatory relationship already established. No question of interference with state prerogatives is presented by this case. No rates made or imposed by state authority are involved and therefore the procedural steps of section 13 were not necessary at all. The Commission was

simply amending its own orders and raising its own rates.

The circumstance that standard fares were reduced subsequent to 1925, while these commutation fares were not, is unimportant in this case. The relationship of equality in Appellee's commutation rates prescribed for 1925 and the future was in no sense controlled by or related to the level of standard or line-haul passenger fares. The commutation passenger traffic in the Chicago suburban area, state and interstate, as shown by the 1925 report and order, is handled chiefly by local suburban trains rendering a complete service originating and terminating within the district and having no relation to the main line train movement. The conditions are essentially like those recognized by this Court with respect to freight rates covering switching movements within the Chicago switching district as "having no relation to line-haul movements." *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 477.

The Commission's previous findings that no conditions exist to justify intrastate commutation fares lower than the corresponding interstate commutation fares in Appellee's Chicago suburban area and that the two classes of traffic are "quite thoroughly mixed," make the following statements from the opinion in the Chicago switching rate case, above cited, (*Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 483-485) of controlling importance here:

> "It is plain from the nature of the inquiry that the rate level, to which both classes of traffic were raised, was found reasonable on the basis of the traffic as a whole. Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the

two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues.

* * * * * * *

The effect of maintaining a lower rate, intrastate, than the reasonable interstate rates is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried on, as in the District, under substantially the same conditions."

The Commission's intent must be drawn from its order. It prescribed that "all outstanding orders * * * authorizing or prescribing interstate and intrastate fares * * * be and they are hereby modified * * * only to the extent necessary to permit the increase herein authorized to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, said outstanding orders." Could anything be plainer? Then, as if to insure the effect as we claim it, the Commission required that a copy of its order be filed in the docket of each such proceeding, including certain section 13 proceedings, among which is the very section 13 proceeding in which was established the continuing relationship of these Illinois interstate and intrastate commutation fares.

Furthermore, orders such as this are not self-executing, but require filing of tariffs to make the rates effective. As this record shows (R. 10), after the Illinois Commission had attempted to suspend Appellee's tariffs, he filed with the Interstate Commerce Commission appropriate amendments to those tariffs, withdrawing all proposed increases in Illinois intrastate commutation fares except those on the classes of tickets being maintained by virtue of the 1925 Interstate Commerce Commission order, as amended by the 1942 order. This made it clear

that the Interstate Commerce Commission's orders, and only those orders, were being relied upon to justify the increase. The Interstate Commerce Commission did not suspend the tariff, as it has full power to do, either upon complaint or upon its own initiative without complaint,[1] but allowed it to go into effect.

CONCLUSION.

Realizing, as we do, the weight to be given to the views of a body of the standing and experience of the Interstate Commerce Commission, we submit, nevertheless, with all due deference, that the order of the Commission must be construed on the basis of what is found within its four corners; that the order as written was of the broadest possible sweep, as was the petition which it purported to grant; that the fares, never made or imposed by state authority since 1925, were as much subject to the control of the Commission as any other fares held or maintained by its orders, and that when, as part of a general revenue case, the Commission found reasonable a new ceiling as to interstate commutation fares, it had the right, and even the duty, to relate those intrastate fares to the interstate fares on that new-found level of reasonableness and thus prevent a reestablishment of the unlawful discrimination condemned by section 13.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.

March 1, 1943.

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[1] See Appendix A.

APPENDIX A.

Interstate Commerce Act, §15(7); 44 Stat. L. 1447.

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of

property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."